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No. 72-1603

IN THE

Supreme Court of the United States

October Term, 1972

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Harold J. Cardwell, prays that a Writ of Certiorari issue to review the judgment and final order of the United States Court of Appeals for the Sixth Circuit entered on April 5, 1973, which judgment affirmed the granting of the writ of habeas corpus to respondent by the United States District Court for the Southern Division of Ohio, Eastern Division.

OPINIONS BELOW

The opinion of the United States District Court appears at page 35, *infra*. The opinion of the United States Court of Appeals, Sixth Circuit, affirming the district court appears at page 27, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of §1254(1), Title 28 U.S.C.; and pursuant to Rule 19(b) of the Supreme Court Rules. Petitioner believes that the decision of the Court of Appeals is in conflict with the decisions of this Court and raises an important question of Federal law which should be decided by this Court.

QUESTION PRESENTED

Should a federal court invalidate the admission of the evidence in a state criminal prosecution when the record shows that the evidence was seized as an instrumentality of the crime incident to the defendant's arrest which seizure was necessitated by exigent circumstances?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 8, 1967, the Delaware County Grand Jury returned an indictment charging respondent with murder in the first degree in violation of §2901.01, Ohio Revised Code. He was tried before a jury on March 4-21, 1968, and found guilty with the recommendation of mercy. On March 29, 1968, he was sentenced to a term of life imprisonment in the Ohio Penitentiary.

Respondent appealed his case directly to the Fifth District Court of Appeals for Delaware County which affirmed the judgment of conviction on February 6, 1969. Thereafter, respondent appealed to the Supreme Court of Ohio which affirmed his conviction on May 13, 1970. See *State v. Lewis*, 22 O.S. 2d 125.

Respondent then filed a Petition for Writ of Certiorari in the Supreme Court of the United States. Included among those questions presented by that petition was the following question:

"Were appellant's (sic) rights under the Fourth and Fifth Amendments abridged where appellant's automobile, parked on a private lot one-half block from site of appellant's arrest, was seized and searched without legal process of any kind — even though appellant had been out of the automobile for over eight hours — and where the fruits obtained by

such search were received in evidence at appellant's trial in the state court?"

This Court denied the Petition for Writ of Certiorari. See *Lewis v. Ohio*, 400 U.S. 959 (1970).

In April of 1971, respondent filed a petition for the writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division alleging the following as a basis for his claim for relief:

1) His arrest was unlawful because it was predicated upon a warrant that had issued under §§2935.09, 2935.10, 2935.17 and 2935.19 of the Ohio Revised Code, which sections are unconstitutional on their face in that they;
   a) fail to provide that a judicial determination be made prior to issuance of a warrant;
   b) fail to provide that facts be set forth in the affidavit that would permit an impartial judicial determination as to the existence of probable cause for issuance of the arrest warrant;
   c) fail to require the officer to state his source, or to aver that such source had previously been reliable.

   The subsequent eliciting of the petitioner's statements and the seizure of his automobile incident to the arrest when entered as evidence in the trial of this cause served as a basis for his conviction, contravening the petitioner's rights under the Fourth and Fourteenth Amendments.

2) His interrogation and subsequent arrest and seizure of his automobile by a vigilante committee (Division of Criminal Activities — ostensibly at the direction of Deputy Sheriff Lavery) was in violation of his right of Fourteenth Amendment's procedural due process, where

such committee, assigned by the Ohio Attorney General, was, in actual point of law, operating without legal authority where the Attorney General had no such statutory appointive powers and the subsequent seizure of evidence as a result of this action by the Attorney General when entered as evidence during the trial of this matter served as a basis for petitioner's conviction.

3) His Fifth Amendment rights were infringed where the vigilante committee (Division of Criminal Activities) summoned the petitioner to the Office of the Attorney General, initiated an interrogation of the petitioner prior to having given him the warning required by Miranda, and that when the purported warning was given, he was not apprised of certain facts, i.e., that anything said can and will be used against him in court, or that an arrest warrant had been issued for his arrest, or that his conversation, prior to the warning as well as after, was being monitored by a hidden electronic eavesdropping apparatus thereby denying the petitioner his Sixth Amendment right to counsel during a critical stage of the proceedings, and the surreptitiously acquired statement when entered as evidence in the trial of the cause served as a basis of his conviction.

4) He was deprived of a fair trial where after the trial court overruled State's Exhibit III, the trial court erred in permitting the State to present into evidence the hearsay contents of the exhibit in toto, by means of a witness for the State reciting verbatim therefrom; such testimony serving as a basis for conviction and violation of petitioner's rights under the Sixth and Fourteenth Amendments.

5) The warrantless seizure of his automobile, parked on a private lot one-half block from site

of his arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's case), further, the automobile was not seized contemporaneous in time and place with petitioner's arrest, and evidence seized therefrom served as a basis of his conviction.

6) He was deprived of any chance he may have had for a fair trial where a woman, whom the State alleged, by pre-trial press releases, was his "second wife," was issued a subpoena by the State in such flamboyant manner as to maximize newspaper, radio and television coverage and, where, this "witness" was never called to testify; and where the State with manifest intent, branded the petitioner as a "beast" in the eyes of the jurors, by parading her through the courtroom after the jury was seated, and kept her within the eyesight of the jury by the seating arrangement provided by the State of Ohio; hence, the misconduct by the Office of the Prosecuting Attorney in perpetuating the prejudicial publicity which was crucial to, and denied the petitioner's right to a fair trial and served as a basis of his conviction by denying him the right of due process under the Fourteenth Amendment.

7) Hearsay evidence of the most flagrant kind was adverted to with the manifest intent of depriving him of his right to a fair trial where the contents of an unrelated telephone call was admitted under the trial court's misinterpretation of the hearsay rule and constituted a deprivation of petitioner's right of confrontation and cross-examination under the Sixth Amendment.

8) His right to a fair and impartial trial by a jury free of prejudice was impaired where evidence,

known to be incompetent when offered, was wrongfully admitted for consideration of the jury and served as a basis of conviction violating the petitioner's constitutional rights as provided by the Fourteenth Amendment.

9) The trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial and served as a basis of his conviction, depriving him of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment's right to due process.

10) The trial court's denial of his Motion for a New Trial based upon newly discovered evidence was a flagrant abuse of the discretion lodged in that court and served to perpetuate petitioner's imprisonment for a crime of which he is innocent, denying him due process under the Fourteenth Amendment.

Following the filing of a Return of Writ and appointment of counsel, an evidentiary hearing was held on April 20, 1972.

Thereafter, on May 19, 1972, the court issued an Opinion and Order finding nine of the ten issues to be without merit. (See Appendix) However, as to issue five, the court found that respondent had been denied due process of law and ordered "that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioner be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials initiate action for a new trial, it is ORDERED (sic) that no writ of habeas corpus shall issue."

Petitioner then filed a timely Notice of Appeal and obtained a Stay of Execution. Oral argument was heard by the United States Court of Appeals for the Sixth Cir-

cuit on December 8, 1972 and on April 5, 1973, the Court of Appeals issued its decision affirming the Opinion of the District Court. (See Appendix) It is of this Opinion from the Court of Appeals which petitioner seeks the Writ of Certiorari.

STATEMENT OF FACTS

At the trial of respondent, one Steven Molnar, Jr., a laboratory technician and firearms examiner for the Ohio State Bureau of Criminal Identification and Investigation, testified for the State. He testified as to his opinion of the type of tire that made certain tracks at the scene of the homicide of July 19, 1967, for which respondent was charged. Furthermore, he testified as to his opinion regarding samples of paint scraped from respondent's automobile, which had been impounded.

Initially, he testified that he took paint scrapings from respondent's car while it was at the Columbus Police impounding lot. He also said that he had paint scrapings which had been taken from the murder victim's car, which, it was thought, was pushed over the river bank at the scene of the crime, by another car. This examination occurred on October 11, 1967, and the paint was taken from the right rear and the left front of respondent's car, and from the right rear fender and the right side of the rear fender of the victim's car for purposes of comparison. He went on to testify that, in his opinion, there was

> " . . . no difference in color, texture, or order of layering of the paint samples that I was comparing." (Bill of Exceptions, p. 221)

Furthermore, the color of paint was the same.

The paint samples from respondent's car and testimony were admitted over objection.

There was, however, a pre-trial hearing on a motion to suppress filed by respondent. The motion concerned the evidence and testimony referred to above. The hearing was held in the trial court on January 25, 1968. Testifying were Clyde Mann, then Chief Investigator for the Division of Criminal Activities of the Attorney General of Ohio, David Tingley, Attorney at Law, and Sgt. William Lavery, of the Delaware County, Ohio, Sheriff's Office.

Facts adduced at this hearing were as follows:

Respondent was interrogated in the office of the Attorney General, 40 S. Third Street, Columbus, Ohio, on October 10, 1967, pursuant to a request to come to the office. He was served with an arrest warrant and placed under arrest late in the afternoon, after which his car was impounded by the Columbus, Ohio, Police Department.

Mr. Mann testified at the hearing that present during the interrogation of respondent of October 10, 1967, in the Attorney General's Office, were Lavery, Jim Heise, David Kessler, Ed James, respondent and himself. He said that he told respondent, after he was arrested, that he, Mann, was going to impound respondent's car because it was used in a felony, and that he had no warrant. On direct examination, Mr. Mann revealed that respondent asked him to have his car impounded or put in a police lot for safekeeping.

Next to testify was David E. Tingley, Attorney at Law, who testified that he witnessed the facts surrounding the seizure of the automobile. He testified that at about 5:30 p.m. on October 10th, respondent was in custody and

that Clyde Mann indicated to Mr. Scott that he wanted possession of some books and records respondent brought with him as well as the automobile, because it was used in the commission of a felony. Scott then, according to Mr. Tingley, said that he would not enter into a physical fight over the car and gave the keys to Mann. He then got the parking ticket from respondent and gave it to Mann.

Next to testify was Sergeant William Lavery. He stated that he obtained a warrant for respondent's arrest on the morning of October 10, 1967. Furthermore, he stated that he requested Mr. Mann to have the automobile impounded but that, according to his recollection, respondent had asked the officers to watch the car as he was concerned about it.

The trial court made the following finding:

> "In this Court's opinion the seizure of this car was incident to a lawful arrest. In this Court's opinion the subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the Defendant was arrested."

At the evidentiary hearing of April 20, 1972, in the court below, there was much testimony concerning the alleged illegal search and seizure. Paul Scott, defense counsel at the trial, testified that respondent gave him the keys to his car shortly before or subsequent to his being arrested, with instructions to return the automobile to his (respondent's) family. He also gave Scott the parking lot claim ticket. Furthermore, after Scott's arrival at the Attorney General's Office and after a conference with respondent, the arrest warrant was served on respondent. After that, according to Scott, Clyde Mann

confronted Scott and demanded respondent's briefcase and automobile. Rather than get into a physical confrontation with Mann, Scott relinquished the keys and the claim check to Mann with the admonition that he would see Mann "in court on a Motion to Suppress on that." (Transcript of evidentiary hearing, p. 28)

On cross-examination, Mr. Scott testified that, although there was no real threat from Mann, he did not willfully turn the automobile over to Mann, that it was done under protest, subject to what would happen in a court of law. (T., pp. 47-48)

Sergeant Lavery testified first for the respondent. He stated that, prior to the actual seizure of the car, he did know the description of respondent's car, that on the day of the seizure he had no search warrant, and that respondent asked that his car be taken care of. (T., pp. 76-78) The Columbus police actually towed the car.

On cross-examination, he stated that he believed the request by respondent that his car be taken care of was made about 5:00, while Mr. Scott was present. He further said that, in his opinion, respondent's request was a general request made of no one in particular. He could recall no discussion between Scott and Mann relative to the car. He also stated that he did not know that respondent's car was parked on the lot south of the Attorney General's Office. (T., p. 92)

Respondent himself was next to testify on the issue of illegal search and seizure at the evidentiary hearing. He testified that he drove to the attorney general's office and parked on a parking lot near that office. He also denied that he asked anyone from the attorney general's office to remove his car saying that he gave his keys and claim check to Paul Scott before he was arrested so that

Scott could take the car home for respondent's family's use. Furthermore, he testified that the police officers did have a description of his car.

Clyde Mann was the first witness for petitioner to testify relative to the search and seizure issue. He testified again that respondent requested Mr. Mann to take care of his car and claim ticket. Furthermore, this occurred at approximately 5:00 p.m., on October 10, 1967, in the hallway inside the attorney general's office and that, to the best of his knowledge, the claim check was handed directly to him by respondent. This confrontation apparently occurred close in time to Mr. Mann's request of Scott for possession of respondent's briefcase. Mr. Mann also again testified that he believed the car was used in the commission of the crime and for this reason wanted the car.

Sergeant Lavery was called by petitioner as his witness and testified on direct examination. He testified as to facts he had in his possession on October 10, 1967, relative to respondent's involvement in the crime and the role his automobile played in the commission thereof. (T., pp. 139-142, 147)

REASON FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT THAT PAINT SAMPLES TAKEN FROM RESPONDENT'S AUTOMOBILE WHICH HAD BEEN LEGALLY SEIZED AS INCIDENT TO HIS ARREST WERE ADMITTED IN EVIDENCE AT RESPONDENT'S TRIAL IN VIOLATION OF HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The United States District Court authored a lengthy analysis of the allegation that admission of certain paint scrapings at trial against respondent was violative of the Fourth and Fourteenth Amendments. The court concluded that the evidence was not seized as incident to a valid arrest, that respondent did not consent to its seizure, and that the search was not justified as having been seized in "plain view." The court of appeals indicated it was in "full agreement" with this opinion. Petitioner submits such a conclusion was erroneous.

Petitioner initially notes that the evidence complained of by respondent in the courts below was paint scrapings taken from the exterior surface of his car while it was in the Columbus, Ohio, police impounding lot. No evidence was admitted as a result of any intrusion to the car's interior.

Petitioner contends, therefore, that such paint scrapings were properly admitted against respondent at trial as such scrapings were the result of a scientific examination of an instrumentality of the crime for which respondent was arrested. Cf: *Cotton v. United States*, 371 F. 2d 385 (9th Cir., 1967); *United States v. Graham*, 391 F. 2d 439 (6th Cir., 1968), wherein it is stated at page 442:

> "While it is true that the Constitutional proscription against unreasonable searches and seizures extends to automobiles, since they, like houses, legitimately serve as repositories for personal effects and belongings of the owners and occupants, this is immaterial to the question presented at bar. No articles of evidence separate from and independent of the cars themselves were obtained as a result of the police examination, as was true in such cases as Preston v. United States, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed.

> 2d 777 (964), and Cooper v. State of California, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)."

See also, *United States v. Wade*, 457 F. 2d 828 (7th Cir., 1972); *United States v. Dadurian*, 450 F. 2d 22 (1st Cir., 1971); *Lundberg v. Buckhoe*, 338 F. 2d 62 (6th Cir., 1964).

Even assuming that this examination did constitute a search within Fourth Amendment contemplation, which petitioner denies, such was valid as

> ".... the search of the car - - - whether the state had legal title to it or not - - - was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." *Cooper v. California*, 386 U.S. 58 (1967).

The record clearly indicates that the inspection of respondent's car was consistent with the reason the car was impounded and with the reason for which respondent was arrested. No intrusion was made to the interior and no general exploratory search for evidence of any kind complained of in the courts below was conducted. The car itself was evidence and the police had complete dominion and control over it. As such, there could be no further trespass committed by a subsequent examination.

Under the circumstances, therefore, it cannot be said that the inspection and examination of the paint samples in question for purposes of identification, which identification was consistent with the reason the car was seized, was unreasonable. See, *United States v. Powers*, 439 F. 2d 373 (4th Cir., 1971); *United States v. Johnson*, 413 F. 2d 1396 (5th Cir., 1969).

In its simplest form the situation presented here involves the propriety of the examination of a piece of evidence after seizure. The case of *People v. Teale*, 450

P. 2d 564 (Cal., 1969) speaks to this proposition at footnote 10, p. 572:

> "Only an object reasonably believed to be itself evidence of the charged crime is subject to seizure and, therefore, to detailed examination subsequent to seizure."

Respondent's automobile was reasonably believed to have been evidence of the crime itself. (See, pp. 139-142, 147, transcript of the evidentiary hearing.)

An analogous situation would be where perhaps a gun believed to have been a murder weapon, or blood-stained clothing believed to have been worn by a suspected offender were in police possession. Can it be doubted that the police have every right to examine such items consistent with the reasons they were seized? Obviously not. Such, then, is the instant situation.

As to the seizure of the car, it must first be noted that "automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968). See also, *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925). Petitioner submits that such a proposition is equally applicable to seizures of automobiles as it is to searches. Accordingly, the seizure of the automobile was necessitated by the exigencies of the situation compounded by the fact that the item or evidence to be seized was a large, readily mobile entity such as an automobile.

Additionally, at the time of the seizure and at the time of the trial, the "relevant test (was) not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States v. Rabinowitz*,

339 U.S. 56 (1950). Petitioner submits that the actions of the investigating authorities were at all times reasonable and consistent with respondent's Fourth Amendment protections.

The record from the trial court and the record from the district court shows that respondent relinquished possession of the keys and claim check to his car which was parked approximately one-half block away. He gave the keys and claim check to his attorney, Paul Scott, who then turned them over to the investigating authorities under circumstances found not to have constituted consent. These events occurred at the attorney general's office at 40 S. Third Street, Columbus, Ohio.

Petitioner submits that the seizure of those items at that time constituted the intrusion into respondent's Fourth Amendment protected area, which intrusion was justified as being incident to the valid arrest of respondent. By seizing the keys and the claim check at that time, respondent's control and dominion over the car effectively ceased. Quite obviously, without either of these items, the complete use of the automobile by respondent was tremendously, if not completely, limited. Respondent's "possession" of the car was dependent upon the keys and claim check.

Of equal effect would have been the only other practical alternative available to the investigating authorities at the time; that being to have placed a guard at the car and make it inaccessible to Scott until a warrant could be obtained to remove the car. In either case, an intrusion into respondent's Constitutionally protected domain would have occurred, either of which would have been justified. This Court has spoken to the practice of allowing a "lesser" intrusion to justify a "greater" intrusion of an individual's Fourth Amendment rights:

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers v. Maroney*, 399 U.S. 42, at 51-52 (1970).

The actions of the investigating authorities were justified as being incident to a valid arrest, having occurred at a place and time contemporaneous with the arrest. *Preston v. United States*, 376 U.S. 364 (1964). The seizure of the car at that time was necessitated as the authorities had reason to believe that a very valuable piece of evidence was likely to be moved or destroyed. The record bears out their fears.

At the time of the seizure of the keys and the claim check, Paul Scott was zealously protecting the rights of his client and the property of his client. In that pursuit he felt constrained to vigorously object to the seizure of respondent's briefcase and car. There could be no doubt that he was going to comply with his client's wishes regarding the automobile regardless of the desires of the authorities. (T., pp. 26, 45-46)

The authorities had cause to believe that respondent had on prior occasions concealed or destroyed evidence. (T., p. 141; Bill of Exceptions, pp. 500-504, 515-516, 274-275, 213, 545-548) Also during the interrogation session

of October 10, 1967, in the attorney general's office, respondent was made acutely aware of how the authorities felt the car figured into the crime and what part of the car was thought to have been used. There was no reason to think that respondent could not have contacted someone, friends or family, with instructions to repair those portions of the automobile immediately. In any event, there was no reason, under all of the circumstances, for the police to have been required to speculate about what might take place or what might happen to the evidence.

The United States District Court correctly says, at page 22 of its Opinion and Order, that a warrantless search incident to arrest may be justified if

> "[t]he vehicle is mobile, and if officers delay to obtain a search warrant, one of defendant's confederates will remove the automobile and prevent the police from searching for the object or objects subject to seizure."

Petitioner does not intend to characterize Paul Scott as a "partner in crime" by implying he was respondent's confederate. Such is not necessary. The fact is he was going to do with the car what respondent wanted done with it, while acting in the role of respondent's protector. For the police to have required anything less of him, including relinquishing the keys and claim check, would have constituted an invasion into respondent's control and dominion over the automobile, which under the circumstances would have been justified.

The district court found that there was no facts present to justify the seizure, an opinion joined in by the court of appeals. However, petitioner contends that it was those facts, as set out above, which constituted the very real prospect of destroyed or at least moved evi-

dence which necessitated the seizure of the car in the manner and method it was seized and at the time it was seized. The facts, which are largely uncontradicted, are ignored by the courts below yet were apparently given much consideration by the trial court, who was in the best position to make the most valid judgment. The courts below are clearly in error. Cf., *LaVallee v. Rose*, —— U.S. ——, 35 L. Ed. 2d 637 (1973).

The record from the District Court clearly affirms the fears of the authorities at the time of the seizure, when Paul Scott reiterates that his sole purpose in having possession of the keys and claim check was to move the car subject to his client's wishes.

Yet it is not surprising that the Courts below would chose to ignore these uncontradicted facts. Both courts were laboring under a misapprehension regarding the necessity of a warrant. Both courts seem to believe that because a warrant *might* have been readily obtained to effectuate a seizure at an earlier time, the conditions otherwise justifying a seizure as incident to a valid arrest are either absent or of no force or effect. Petitioner does not understand this to be the crux of the law relating to the validity of a search incident to a valid arrest. The district court delineates at p. 22 of the Opinion and Order two conditions, one or both of which must be met, before a search can be justified as being incident to an arrest:

> a. The circumstances establishing probable cause for search of the vehicle were unknown to the police prior to the defendant's apprehension.
>
> b. The vehicle is mobile, and if the officers delay to obtain a search warrant, one of defendant's confederates will remove the automobile and prevent the police from searching for the object or objects subject to seizure.

The court obviously considers the fact that a warrant could have been obtained to be the primary reason condition b., above, was not met. As stated above, there is no doubt that the car would have been moved thereby preventing the police from seizing the evidence and subjecting such evidence to possible destruction. This is the crux of the seizure of respondent's car as incident to his arrest. Bear in mind that it is not disputed that the authorities had probable cause to believe that the car played a role in the murder for which respondent was charged. (T., pp. 139-142, 147)

Whether or not the seizure of respondent's car can be justified as incident to his arrest, there is no doubt that the seizure can nevertheless be justified on the basis of the existence of probable cause to seize the automobile. *Chambers v. Maroney, supra*; *Carroll v. United States*, 267 U.S. 132 (1925). "Exigent circumstances" appear to justify the seizure in this regard considering also the very mobile nature of an automobile. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Petitioner, therefore, submits that "exigent circumstances" justified the seizure of the automobile in the instant situation, and a finding otherwise by the courts below was clearly erroneous.

But, again, it is not surprising that the courts below would ignore those facts constituting the "exigent circumstances", for these courts again appear to have been preoccupied with the possible opportunities the authorities might have had to obtain a warrant.

It cannot be doubted that the quantum of pre-seizure information known to the authorities at the time of the seizure, especially considering the unsatisfactory answers to questions regarding damage to his car given by respondent during the interrogation of October 10,

1967, established probable cause to seize the car when the authorities did. *United States v. Rodgers*, 442 F. 2d 902 (5th Cir., 1971). The "exigent circumstances", justifying seizure at that time have been reviewed already in this argument. Briefly, they include the fact that Mr. Scott most definitely would have moved the car to wherever he or respondent desired. The police suspected respondent of concealing evidence on prior occasions. It is notable that respondent at the time had many bases of operations including his home and businesses where he might have legitimately put his car. These places included locations in Franklin and Delaware Counties.

Petitioner submits that what opportunity the authorities had to secure a warrant prior to the seizure of the car is not particularly relevant to the existence of "exigent circumstances". Petitioner does not intend to derogate the necessity of a warrant or the judgment of a detached and neutral magistrate in determining the existence of probable cause, but we do contend that, even assuming a warrant may have been obtained at an earlier time, such does not attenuate the urgency of a warrantless seizure at a later time, when probable cause still exists for the seizure and it is otherwise justifiable.

If it is feared that the authorities either by design or by negligence failed to get a warrant at an earlier time so they could seize the car at the time of his arrest without the intervention of a magistrate's judgment, such fears are not well taken. First, the authorities are taking a great chance the evidence will be destroyed or otherwise made unavailable to them while they delay. In any event, if they did have facts sufficient to establish probable cause in the mind of a magistrate, of what value would it be for them to fail to obtain a warrant at that time? Bear in mind that the seizure in question still

requires probable cause. The rewarding of devious police practices is not to be feared by upholding the seizure in question.

In any event, petitioner contends it is at least questionable that a search warrant could have been obtained prior to the seizure. Admittedly, the authorities did suspect the car played a role in the crime for some time prior to its seizure. Admittedly, the authorities had knowledge of the identity of respondent's car. However, these facts alone are hardly enough to believe a warrant may have been issued.

The fact that the authorities obtained an arrest warrant on the morning of October 10, 1967, prior to interrogating respondent is of little consequence. Note that the arrest warrant was obtained in Delaware County, Ohio and the interrogation was going to take place in Columbus, Franklin County, Ohio. The Municipal Court in Delaware, Ohio has no jurisdiction to issue search warrants for Columbus, Ohio. See, §2933.21, Ohio Revised Code.

The courts below also assume that during the entire period of time on October 10, 1967 that respondent was at the attorney general's office, it was known to the authorities that respondent drove the car in question to the office and that he parked the car on the parking lot from which it was seized. The implication from this is that they could have obtained a warrant in the course of the day. However, there is no support in the record for the conclusion that the location of the car was known to the authorities. In fact, there is uncontradicted support for the contrary. Sgt. William Lavery of the Delaware County Sheriff's Office testified as follows at page 92 of the transcript of the evidentiary hearing:

"The Court: Did you know this car was parked on the lot south of the office?
The Witness: No, I didn't know that and I don't believe Mr. Mann did. I didn't know it personally.
The Court: You say you didn't?
The Witness: I did not."

As recently stated by this Court in *Cady v. Dombrowski*, —— U.S. ——, 37 L.Ed. 2d 706, the question in this case was whether the search was unreasonable solely because the local officer had not previously obtained a search warrant. In *Cady* after citing several cases dealing with the search of an automobile seized and searched without a warrant by the police, this Court stated:

> "The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, see Cooper, supra, Harris, supra, Chambers, supra, and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments."

Petitioner believes that the conditions surrounding the search and seizure in this case are not unlike those in *Cady*.

For the foregoing reasons, petitioner submits that the finding that there were no "exigent circumstances" justifying the seizure of respondent's car with the resultant finding that the seizure of the automobile violated respondent's Fourth Amendment rights was clearly erroneous.

CONCLUSION

Petitioner feels that the Courts below have improperly gauged the impact of *Coolidge v. New Hampshire*, *supra*, and *Cook v. Johnson*, 459 F. 2d 473 (6th Cir., 1972) in the process of invalidating the seizure of respondent's automobile. While on the surface both cases seem to be factually in point with the instant situation, and while the state has, in all the cases, attempted to justify the search for a number of similar reasons, there are significant factors in both, which factors are not present in the instant case, and which make the instant seizure allowable. In both cases an individual's private property was entered and taken therefrom, in each case, was the individual's automobile where there was no prospect the automobile was about to be moved. Petitioner would not contest if respondent's car had been seized from his private property where there were no real prospect of the car being moved.

In the instant situation, the intrusion into respondent's control over his car was not dependent upon an invasion of his physical premises. The car itself was seized from a public parking lot, upon which police needed no specific authorization to enter.

In neither of the two cases was there any significant prospect of the car in question being moved while in the instant situation such was actually a certainty. While the authorities had information relating to the car, prior to the seizure, there is no indication such information amounted to probable cause to obtain a warrant. Nor can it be said that on the morning of the interrogation it was reasonable to procure a warrant considering the mobile nature of the item to be seized and the uncertainty of its location at any particular time. Petitioner believes rather, that the decision in *Cady v. Dombrowski, supra*, should govern this case.

Accordingly, petitioner submits that the admission of the paint scrapings in question were admitted at respondent's trial without violating his rights under the Fourth and Fourteenth Amendments to the Constitution. A finding to the contrary by the courts below and the granting of the Writ of Habeas Corpus were conclusions clearly erroneous.

Lastly petitioner iterates that the question of the legality of the seizure of the paint samples was, after a motion to suppress and *voir dire* hearing, determined by the trial court. The question was raised by respondent and rejected by two Ohio appellate courts and this Court. Petitioner believes that the district court was in error in relitigating the matter. As enunciated by Mr. Justice Powell in his concurring opinion:

> "Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting

> the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system." *Schneckloth v. Bustamonte*, ___ U.S. ___ 36 L. Ed. 2d 854, 855 (1973).

See also: *Cupp v. Murphy*, ___ U.S. ___ 36 L.Ed. 2d 900 (1973).

Wherefore petitioner prays that this Court grant the writ of certiorari sought herein.

Respectfully submitted,

WILLIAM J. BROWN,
Attorney General,
LEO J. CONWAY,
JEFFREY L. MCCLELLAND,
Assistant Attorneys General,
Attorneys for Petitioner.

APPENDIX A

OPINION OF THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

ARTHUR BEN LEWIS,
Petitioner-Appellee,

v.

HAROLD J. CARDWELL, Warden,
Respondent-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed April 5, 1973.

Before: PHILLIPS, Chief Judge, WEICK and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal is before the Court for review of a judgment and order of the district court conditionally granting a writ of habeas corpus pursuant to the power vested in that court by 28 U.S.C. §2241.[1]

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[1] The district court opinion states:

Accordingly, it is ORDERED that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioned be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials initiate action for a new trial, it is ORDERED that no writ of habeas corpus shall issue. *Lewis v. Cardwell*, —— F. Supp. —— (S.D. Ohio 1972)

The case arises from a brutal shotgun slaying for which the appellee, Arthur Ben Lewis, Jr., was indicated, tried and subsequently found guilty of first degree murder by a state trial court jury. It is well to remember that this Court's sole duty in this case, as in all similar cases, is to determine whether the petitioner's constitutional rights were violated, regardless of the evidence pointing to the guilt of the accused.

The single issue presented for resolution is the correctness of the District Court's holding that the appellee's fourth and fourteenth amendment rights were violated by the admission at his trial of evidence obtained from a warrantless seizure and subsequent search of his automobile. The District Court's exhaustive and comprehensive opinion is reported in —— F. Supp. —— (S.D. Ohio 1972). Since we are in full agreement with the opinion, we find it unnecessary to do more than to emphasize and further clarify several points made below. Only the skeletal facts relevant to the single search and seizure question need be summarized here.

During the course of investigating this July 19, 1967, slaying, the law enforcement officers focused their attention on the appellee. On July 24, 1967, Delaware County Deputy Sheriff Lavery, one of the officers assigned to the case, talked with the appellee at his place of business and at that time viewed his 1966 Pontiac automobile. From other information gathered in the investigation Lavery believed that the appellee's car had been used to push the murder victim's automobile over a river embankment at the scene of the crime. On September 28, 1967, Deputy Lavery and an official from the State Attorney General's office again interviewed the appellee and on October 9, 1967, the appellee was contacted by telephone and requested to appear the next day at the

offices of the Division of Criminal Activities in Columbus, Ohio, for further questioning. Early the next morning, October 10, 1967, Deputy Lavery obtained a warrant for the appellee's arrest but did not attempt to procure a warrant for the search of his car.

The appellee arrived at the offices of the State Attorney General shortly after 10:00 A.M. October 10, 1967, where several staff members of the Division of Criminal Activities and Deputy Lavery questioned the appellee for a substantial part of the day. The arrest warrant was not served on the appellee until approximately 5:00 P.M. that afternoon, an event which occurred shortly after the arrival of his attorneys. Around the time of appellee's arrest the law enforcement officials obtained the keys and the claim check for the appellee's car which was parked in a pay parking facility about a half block from the state offices.[2] One of the state officials then called a wrecker to seize the automobile. The seizure was effected in this manner, with the result that none of the investigators personally viewed the vehicle or ascertained whether the car was in fact parked in the lot. The seizure was made without obtaining a warrant.

A lab technician viewed the car in the impounding lot on October 11, 1967, and searched the trunk of the car. He also removed paint samples from the exterior surface of the appellee's automobile, consisting of the outer coat of paint and the two primer coats underneath. At the appellee's trial this technician testified that he found no difference in the color, texture or the order of layering

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[2] The district court found that the keys were actually obtained from the appellee's attorney who relinquished them to the state officials under protest to avoid a physical confrontation. The full details of this incident are recounted in the lower court's opinion. What is important for our purposes is that the court found that the appellee did not consent to the seizure and search of his automobile. This finding is not clearly erroneous.

of paint of these samples as compared with foreign paint marks found on the victim's car.

The respondent raises three grounds in attempting to support the warrantless seizure and subsequent search of the appellee's automobile: first, that the search of the automobile was with the consent of the appellee; second, that the search was incident to a valid arrest; and third, that the vehicle itself was an instrumentality of the crime in plain view which the officers had probable cause to believe was used in the commission of a felony. As a corollary to the third contention, the respondent claims that no search was in fact conducted since no items were seized from the interior of the car but rather that the paint scrapings were removed from the exterior surface of the vehicle as a result of a scientific examination of an instrumentality of the crime.

The district court's finding, which we deem to be correct, that the first two contentions were without merit is so fully discussed in its opinion that nothing further need be said with respect to these issues. We confine ourselves to some additional observations concerning respondent's third contention.

Initially, what may be termed a point of semantics needs clarification. The respondent's use of the term "instrumentality of the crime" is an attempt to raise the ghost of an outmoded concept which was laid to rest by the Supreme Court in *Warden v. Hayden*, 387 U.S. 294 (1967), where the Court dispensed with the "mere evidence" distinction which had worked its way into the law of search and seizure. Mr. Justice Brennan's words deserve repetition:

> Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or

> contraband. On its fact, the provision assures the "right of the people to be secure in their persons, houses, papers, and effects . . .," without regard to the use to which any of these things are applied. This "right of the people" is certainly unrelated to the "mere evidence" limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same "papers and effects" may be "mere evidence" in one case and "instrumentality" in another. 387 U.S. at 301-302.

Mr. Justice Stewart also reiterated the demise of the "instrumentality of a crime" and "mere evidence" distinction in *Coolidge v. New Hampshire*, 403 U.S. 443, 464 (1971).

The respondent's third contention is thus premised on an unwarranted assumption. As aptly stated by the district court: "The instrumentality theory assumes that any object used in the commission of a crime may be seized *at any time* without a warrant as long as the officers have probable cause to believe that the object was used in the commission of a crime and the officers are lawfully in a position to view the object." —— F.Supp. at ——. We fully approve the district court's answer to this premise: "The police cannot seize an automobile on the theory that it is an instrumentality of a crime which is in plain view in calculated disregard for the Fourth Amendment requirement that application be made to a judicial officer for a search warrant absent exigent cir-

cumstances." —— F.Supp. at ——. Since no exigent circumstances existed in this case the respondent's instrumentality theory must fail.[3]

The district court indicates that for purposes of deciding the case it is "assuming" that the officers were in a position legally to apply the plain view exception to the warrant requirement. However, the facts of this case clearly establish that event though the officers had probable cause to seize appellee's automobile they in fact never observed the vehicle at all but rather merely dispatched a wrecker to the site where they believed the car was parked. Stated in its simplest form there can be no "plain view" when there is no "view" at all. To attach such an extension to the plain view exception to the warrant requirement would undercut the very foundations of fourth amendment protections and consequently such a proposition is untenable. It is for this very reason that Mr. Justice Stewart, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), emphasized the importance of inadvertence in discovering the evidence when applying the plain view doctrine. We are in accord with this reasoning.[4] Hence, when law enforcement officers

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[3] The district court spells out the lack of exigent circumstances at several points in its opinion. Of particular significance is the fact that the police had planned for several weeks to seize the vehicle but made no effort to obtain a warrant.

[4] The Court is cognizant of the fact that Part II C of Mr. Justice Stewart's opinion was only concurred in by three other justices. However, another justice, Mr. Justice Harlan did concur in the judgment in that case and consequently the evidence seized from the Coolidge automobile was suppressed. Further, Mr. Justice Harlan concurred in Part II D of Mr. Justice Stewart's opinion, a section specifically designed to counter the arguments "that can be made against our interpretation of the 'automobile' and 'plain view' exceptions to the warrant requirement." *Coolidge v. New Hampshire*, 403 U.S. 443, 473 (1971).

This Court has accepted the full reasoning of Mr. Justice Stewart's opinion concerning the plain view and automobile exceptions just last year in *Cook v. Johnson*, 459 F.2d 473 (6th Cir. 1972). We reaffirm the correctness of that position. *See* Annot., 29 L.Ed.2d 1067, 1073-78 (1972).

have prior knowledge amounting to probable cause establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the fourth amendment principle that warrantless seizures are *per se* unreasonable in the absence of exigent circumstances.

The respondent's contention that no search was in fact conducted of the vehicle because the paint scrapings were removed from the exterior surfaces of the car during a scientific examination of evidence of the crime is also untenable. This reasoning is unsound because it is based on the premise that the car was properly seized without a warrant — a contention which we have held to be incorrect under any of the theories advanced by the respondent.[5] Also we cannot agree that standing alone, the police actions involving the vehicle were not a search. As correctly stated by the district court in footnote 10 of its opinion:

> Respondent also apparently argues that there was no search and seizure because the only thing seized — paint — was from the exterior of the car. No cases are cited supporting this novel proposition. Admittedly, testimony describing the exterior color of the car would not run afoul the Fourth Amendment if the witness had lawfully been in a position to observe its color. However, the intrusion herein was not limited to an observation of the exterior of the automobile. A search was conducted of the lay-

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[5] This same error appears in the Ohio Supreme Court's opinion on the appellee's appeal, *State v. Lewis*, 22 Ohio St. 2d 125, 258 N.E. 2d 445 (1970). There the court, relying on *People v. Teale*, 70 Cal.2d 497, 450 P.2d 564 (1969), upheld the search as proper since the car was an instrumentality of the crime. However, the Ohio Supreme Court failed to note that in *Teale* the initial seizure of the automobile was justified as being incidental to the defendant's arrest.

Respondent's reliance upon *Cooper v. California*, 386 U.S. 58 (1967) is misplaced since the underlying premise of the Supreme Court's holding in that case was that the initial seizure of the vehicle was properly made pursuant to the California Narcotics statute, providing for seizure and forfeiture proceedings. Therefore, the seizure was not constitutionally infirm.

ers of paint beneath the visible surface of the vehicle. —— F.Supp. at ——.

In our view the action of the police lab technician in lifting the layers of paint from the exterior car body was as much a search as his opening the trunk of the vehicle.[6]

The judgment of the district court is affirmed.

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[6] On this appeal the respondent cites two cases which he considers analogous to the police actions here. Both cases involve the police obtaining a vehicle's serial number by opening the door of a car already properly in police custody. In both cases the police acted without a warrant.

In *United States v. Graham*, 391 F.2d 439, 442 (6th Cir. 1968), this Court stated:

> Where police obtain an article for *safekeeping* from a suspect taken into custody pursuant to a lawful arrest, we find no authority which requires them to get a search warrant before *examining the article for the purpose of finding a serial number by which the article might be accurately identified.* [Emphasis added].

This Court went on to hold:

> It is here concluded and held that an examination of an automobile *properly* in police custody is not a search thereof, and that evidence of the *serial number* of such car is not excludable from evidence because it was obtained in the course of such an examination. 391 F.2d at 443 [Emphasis added].

This Court relied on *Cotton v. United States*, 371 F.2d 385 (9th Cir. 1967), in *Graham, supra*. In *Cotton* the Ninth Circuit stated:

> They [the police] also had a duty to keep a record of the property that they had impounded so that it could be returned to the suspect or to its owner in due course. For reasons stated below, we do not think that the mere opening of the door of the car for the purpose of making such a record was, under the circumstances, a search, but if it was, the circumstances under which it was done make that search an entirely reasonable one. 371 F.2d at 392.

The court in *Cotton, supra*, also specifically limited its holding, stating:

> When Cotton acquired the car, the serial number and motor number came with it. And we would limit the right to check [the identification number] to those cases in which there is a legitimate reason to do so. 371 F.2d at 393.

See also, United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971); *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970).

We would note that other courts have held that obtaining vehicle serial numbers by opening a car door under similar circumstances is an illegal search. *See, e.g., Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965).

The *Graham* and *Cotton* cases are clearly distinguishable from the instant case. In both cases the vehicles were already properly in police custody — a situation different from the facts before us. Also both *Graham* and *Cotton* were Dyer Act cases and are limited to the situation where the police obtained the *serial* number of cars for identification purposes.

APPENDIX B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 71-76

ARTHUR BEN LEWIS, JR.,
Petitioner,

v.

HAROLD J. CARDWELL, Warden, et al.,
Respondent.

Petitioner, a state prisoner, brings this action for a writ of habeas corpus under the provisions of Title 28, United States Code, Section 2241(c)(3).

This matter is before the Court on the petition, return of writ, briefs and exhibits of the parties, the bill of exceptions in *State v. Arthur Ben Lewis, Jr.*, No. 3952 (Delaware Cty. C.P. Ct. 1968) and an evidentiary hearing held on April 20, 1972.

On November 8, 1967, the Delaware County Grand Jury returned an indictment charging petitioner with the crime of murder in the first degree. He was tried before a jury on March 4-21, 1968, and found guilty with the recommendation of mercy. On March 29, 1968, he was sentenced to life imprisonment in the Ohio Penitentiary.

Petitioner appealed to the Fifth District Court of Appeals for Delaware County which affirmed the judgment of conviction. He then appealed to the Ohio State Supreme Court which, in *State v. Lewis*, 22 Ohio St. 2d 125

(1970), also affirmed the judgment of conviction.

Petitioner alleges that he is in the custody of respondent in violation of the Constitution of the United States, in that:

1. His arrest was unlawful because it was predicated upon a warrant that had issued under §§2935.09, 2935.10, 2935.17 and 2935.19 of the Ohio Revised Code, which sections are unconstitutional on their face in that they:
   a) fail to provide that a judicial determination be made prior to issuance of a warrant;
   b) fail to provide that facts be set forth in the affidavit that would permit an impartial judicial determination as to the existence of probable cause for issuance of the arrest warrant;
   c) fail to require the officer to state his source, or to aver that such source had previously been reliable.

   The subsequent eliciting of the petitioner's statements and the seizure of his automobile incident to the arrest when entered as evidence in the trial of this cause served as a basis for his conviction, contravening the petitioner's rights under the Fourth and Fourteenth Amendments.
2. His interrogation and subsequent arrest and seizure of his automobile by a vigilante committee (Division of Criminal Activities — ostensibly at the direction of Deputy Sheriff Lavery) was in violation of his right of Fourteenth Amendment's procedural due process, where such committee, assigned by the Ohio Attorney General, was, in actual point of law, operating without legal authority where the Attorney General had no such statutory appointive powers and the subsequent seizure of evidence as a result of this action by the Attorney General when entered as

evidence during the trial of this matter served as a basis for petitioner's conviction.

3. His Fifth Amendment rights were infringed where the vigilante committee (Division of Criminal Activities) summoned the petitioner to the Office of the Attorney General, initiated an interrogation of the petitioner prior to having given him the warning required by Miranda, and that when the purported warning was given, he was not apprised of certain facts, i.e., that anything said can and will be used against him in court, or that an arrest warrant had been issued for his arrest, or that his conversation, prior to the warning as well as after, was being monitored by a hidden electronic eavesdropping apparatus thereby denying the petitioner his Sixth Amendment right to counsel during a critical stage of the proceedings, and the surreptitiously acquired statement when entered as evidence in the trial of the cause served as a basis of his conviction.
4. He was deprived of a fair trial where after the trial court overruled State's Exhibit 111, the trial court erred in permitting the State to present into evidence the hearsay contents of the exhibit in toto, by means of a witness for the State reciting verbatim therefrom; such testimony serving as a basis for conviction and violation of petitioner's rights under the Sixth and Fourteenth Amendments.
5. The warrantless seizure of his automobile, parked on a private lot one-half block from site of his arrest, for purpose of ascertaining as to whether said automobile had been an instrumentality of the crime, violated Fourth Amendment prohibition where such seizure was justified only after the seizure; (in theory of the State's case), further, the automobile was not seized contemporaneous in time and place with petitioner's ar-

rest, and evidence seized therefrom served as a basis of his conviction.

6. He was deprived of any chance he may have had for a fair trial where a woman, whom the State alleged, by pre-trial press releases, was his 'second wife', was issued a subpoena by the State in such flamboyant manner as to maximize newspaper, radio and television coverage and, where, this 'witness' was never called to testify; and where the State with manifest intent, branded petitioner as a 'beast' in the eyes of the jurors, by parading her through the courtroom after the jury was seated, and kept her within the eyesight of the jury by the seating arrangement provided by the State of Ohio; hence, the misconduct by the Office of the Prosecuting Attorney in perpetuating the prejudicial publicity which was crucial to, and denied the petitioner's right to a fair trial and served as a basis of his conviction by denying him the right of due process under the Fourteenth Amendment.
7. Hearsay evidence of the most flagrant kind was adverted to with the manifest intent of depriving him of his right to a fair trial where the contents of an unrelated telephone call was admitted under the trial court's misinterpretation of the hearsay rule and constituted a deprivation of petitioner's right of confrontation and cross examination under the Sixth Amendment.
8. His right to a fair and impartial trial by a jury free of prejudice was impaired where evidence, known to be incompetent when offered, was wrongfully admitted for consideration of the jury and served as a basis of conviction violating the petitioner's constitutional rights as provided by the Fourteenth Amendment.
9. The trial court's arbitrary limitation as to scope allowed in the direct examination of a defense witness militated against the fairness of the trial

and served as a basis of his conviction, depriving him of his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment's right to due process.

10. The trial court's denial of his Motion for a New Trial based upon newly discovered evidence was a flagrant abuse of the discretion lodged in that court and served to perpetuate petitioner's imprisonment for a crime of which he is innocent, denying him due process under the Fourteenth Amendment.

Each of the claims for relief will be considered below.

First, the Court will summarize the relevant facts underlying the judgment of conviction as they appear in the bill of exceptions in *State v. Arthur Ben Lewis, Jr.*, No. 3952 (Delaware Cty. C.P. Ct. 1968) and as found by this Court after the evidentiary hearing.

On July 19, 1967 at approximately 2:35 p.m., the body of Paul Radcliffe was found in the brush along the bank of the Olentangy River near the old Tilton building in Delaware County, Ohio. Radcliffe had been killed by multiple pellet wounds of the chest, right arm and right hip.

Delaware County Deputy Sheriffs arrived on the scene shortly after the discovery of the body. They, together with employees of the Bureau of Criminal Investigation and Identification (BCI), investigated the murder scene. Radcliffe's automobile, a 1963 Oldsmobile, was found over the bank of the Olentangy River in the brush near the victim. No weapon was found.

The investigators made casts of tire tracks found at the scene.[1] They also removed foreign paint scrapings

[1] Cast #1 was of a Starfire Imperial tire made by the Cooper Tire & Rubber Co. Cast #2 was of a safety model low profile tire made by U. S. Royal.

from the right rear bumper and fender of Radcliffe's car.

Delaware County Sheriff Eugene Jackson requested the assistance of the Division of Criminal Activities of the Office of the Attorney General of Ohio to investigate the murder. In the succeeding months, the investigation was conducted by Delaware County Deputy Sheriff William Lavery and Chief Investigator Clyde Mann of the Division of Criminal Activities.

Early in the investigation it was learned that in May of 1967 a Columbus businessman, Jack Smith, had become interested in purchasing a business owned by petitioner, Graham's Auto Specialists. They had entered into a contract of purchase at $30,000.00 with a closing date of July 22, 1967. Smith employed Paul Radcliffe, an accountant, to look at petitioner's books for Graham's Auto Specialists.

On July 24, 1967, Deputy Lavery talked with petitioner at Graham's Auto Specialists. Lavery testified at the evidentiary hearing that he considered petitioner a suspect from that time forward.

Mann and Lavery talked with petitioner again on September 28, 1967. At this time the investigation had focused in on petitioner as the prime suspect. Mann called petitioner on October 9, 1967 and requested that he come to the offices of the Division of Criminal Activities at 40 S. 3rd Street, Columbus, Ohio for additional questioning.

On the morning of October 10, 1967 at approximately 8:00 a.m., Deputy Lavery appeared before Delaware County Municipal Judge Thomas C. Clark and filed the following affidavit in support of an arrest warrant:

> Before me, a Notary Public, personally came William B. Lavery, Deputy Sheriff, who, being duly sworn according to law, deposes and says, that one

> Arthur Ben Lewis, Jr., on or about the 19th day of July, 1967, at or about the hour of nine o'clock, A.M., within the State of Ohio, County of Delaware aforesaid and in the Township of Liberty unlawfully then and there did purposely, and of premeditated malice, kill Paul L. Radcliffe, then and there being a human being contrary to Section 2901.01 of the Revised Code in such case made and provided, and against the peace and dignity of the State of Ohio.

Judge Clark issued an arrest warrant for petitioner. The only sworn facts before the Municipal Judge were contained in the affidavit.

At the time he procured the arrest warrant, Lavery had knowledge of the following facts establishing probable cause to believe that petitioner murdered Paul Radcliffe on July 19, 1967 in violation of §2901.01, Ohio Revised Code:

1. Ruth Burns and Alice Stone, residents of the area surrounding the murder site, heard gun shots between 8:00 a.m. and 8:30 a.m. on July 19, 1967.
2. After hearing the gun shots, Ruth Burns heard tires spinning on gravel and the sound of dry wood crackling. She then observed a tan GM product with a black top traveling toward Columbus on Route 315, which passes in front of her house. The automobile was similar in design to her 1966 Corvair.
3. Petitioner owned a beige or gold colored 1966 Pontiac.
4. Gold or beige colored paint was found on the rear bumper and fender of Radcliffe's 1963 Chevrolet.
5. It was Lavery's opinion from observing the murder scene that a vehicle had pushed Radcliffe's automobile over the Olentangy River embankment.

6. The Federal Bureau of Investigation laboratory reported that the paint found on the rear bumper and fender of Radcliffe's automobile was from a 1965 or 1966 GM product.
7. Mrs. Jack Smith received a telephone call between 9:00 a.m. and 9:30 a.m. on July 19, 1967. The caller identified himself as "Radcliffe." He said that the books for Graham's are in "A-1 condition." The caller concluded by saying that he was leaving town and wouldn't be back until Tuesday, July 25, 1967. Mrs. Smith, who had known the victim, said the caller was not Paul Radcliffe.
8. Paul Radcliffe could not have made the call because the observations of Ruth Burns and Alice Stone establish the time of death at around 8:30 a.m.
9. Only petitioner benefited by the information contained in the phone call.
10. Petitioner brought his car to the M & R Garage at approximately 12:00-12:30 p.m. on July 19, 1967 to arrange for repairs to damage to the front grille panel, hood, right front fender, left rear quarter panel and door, and left driver's door of his 1966 Pontiac. The repair work was performed July 20, 1967.
11. On the victim's desk calendar the notation "Call Ben Lewis" appeared on the page dated July 19.

At the time he obtained the arrest warrant for petitioner, Lavery believed petitioner's 1966 Pontiac had been used in the commission of the murder and he wanted to seize the automobile.[2] Lavery did not attempt to obtain a search warrant for petitioner's 1966 Pontiac.

Lavery proceeded with the warrant to the Criminal Activities Division's offices at 40 S. 3rd Street, Columbus,

[2] Lavery first considered petitioner a suspect on July 24, 1967 when he saw petitioner's gold colored 1966 Pontiac at Graham's Auto Specialists.

Ohio. Petitioner arrived at the offices sometime after 10:00 a.m. At 10:30 a.m., investigator Mann began questioning petitioner. Petitioner signed a waiver of his right to remain silent and his right to the assistance of counsel at 10:40 a.m. From that time on the interrogation was recorded, without petitioner's knowledge, by a hidden tape recorder.

Although Lavery was present during the interrogation and other events of October 10, 1967, he did not execute the arrest warrant until approximately 5:00 p.m. in the evening. He testified at the evidentiary hearing that it was a "tactically" better "interrogation technique" to question petitioner before advising him that a warrant had been issued for his arrest.

The questioning covered petitioner's activities on the morning of July 19, 1967; the damage to his 1966 Pontiac; his contacts with Radcliffe prior to July 19, 1967; the type of guns he owned; and his financial condition. Several of petitioner's statements were potentially incriminating.[3] Taken as a whole, the statements were consistent with the defense presented at trial.[4]

The interrogation continued until around noon. Between 12:30 p.m. and 1:00 p.m., petitioner was taken to his home by the investigators and Deputy Lavery. There the investigators searched for a shotgun. Nothing was seized. Everyone returned to the offices of the Division of Criminal Activities.

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[3] Petitioner's recounting of how the 1966 Pontiac was damaged varied from that he gave to the repairmen at the M & R Garage when he had the damage repaired. His statements concerning his financial status were relevant to the prosecution's theory that the murder was motivated by his desire to sell Graham's Auto Specialist to extricate himself from financial difficulties.

[4] Throughout the questioning petitioner consistently maintained his innocence. As he did at trial, petitioner told Mann that he took his son to work at a swimming pool and then picked up some auto parts at Dixie International during the time the murder allegedly occurred.

At no time after his arrival at the Criminal Activities Division office around 10:00 a.m. was petitioner permitted to leave these premises. Furthermore, he had to obtain permission to use the telephone.

The questioning continued for a brief period following the return from petitioner's residence. Around 3:30 p.m., petitioner said he wanted to talk with his attorney. He was permitted to call David E. Tingley, who had previously represented him in civil matters. Mr. Tingley called Paul Scott with respect to representing petitioner. Mr. Tingley and Mr. Scott arrived at the offices of the Division of Criminal Activities at approximately 4:00 p.m. Mr. Scott conferred with petitioner. The interrogation did not continue.

Sometime after 5:00 p.m., Deputy Lavery formally executed the arrest warrant, taking custody of petitioner. As they were leaving the offices of the Criminal Activities Division, Lavery obtained possession of the keys to petitioner's 1966 Pontiac which was parked approximately one-fourth of a block away in a private parking lot open to the public. The manner in which Lavery obtained possession of the keys is in dispute.

At the hearing on a motion to suppress the fruits of a search of the automobile, Mann testified that he, Lavery and David Kessler[5] talked the matter over and decided to impound the automobile. Mann recalled telling petitioner, probably prior to the arrival of Mr. Tingley and Mr. Scott, that he was going to impound the automobile because it was used in a felony. Mann testified that after his arrest, petitioner requested that his automobile be

[5] Mr. Kessler was the Asisstant Attorney General of Ohio in charge of the Criminal Activities Division. He later was designated a special Delaware County Prosecutor to assist in the prosecution of petitioner. He presented the State's case at petitioner's trial.

put in a police lot for safekeeping.[6] Mann then seized the automobile under the authority that it was used in the commission of a felony. Lavery's testimony was substantially the same as Mann's.

Mr. Tingley testified at the hearing on the motion to suppress that Mann told Mr. Scott that he wanted petitioner's automobile. Mr. Scott asked, under what authority? Mann replied that it was used in the commission of a felony. Mr. Scott then relinquished the keys, stating he was "not going to enter into a physical fight with [Mann] if [he was] taking custody of the automobile."

At the evidentiary hearing herein Mr. Scott and petitioner testified that around the time of the arrest, i.e., 5:00 p.m., petitioner gave Mr. Scott the keys to the automobile and a claim check for it, requesting Mr. Scott to see that his wife and family got the automobile. After the arrest, Mann demanded a briefcase containing personal papers belonging to petitioner. Mr. Scott refused. Mann also said that he was going to take the automobile. Mr. Scott testified that to avoid becoming involved in a physical confrontation, he gave the keys to Mann, telling him that he would "see [Mann] in court on a motion to suppress."

Mann and Lavery also testified at the evidentiary hearing. Their testimony did not materially differ from that at the hearing on the motion to suppress. Lavery did concede that he probably would have taken the automobile regardless of whether or not petitioner had asked him to take it for safekeeping.

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[6] Mann testified at the hearing on the motion to suppress that petitioner:

> asked me to have his car impounded, or put in a police lot for safekeeping, because the lot that he had it in, which was next door to our office, he didn't want it to sit there overnight, afraid somebody would ransack the car, and take any merchandise that he had in the car. He asked me to impound the car for safekeeping.

The automobile was impounded by the Columbus Police Department. Steve Molnar, Jr., a BCI lab technician, viewed the automobile on October 11, 1967 in the impounding lot. He searched the trunk and found a new Uniroyal tire. He observed that there were two almost new Hercules Safety Cream 855.14 tires on the front of the automobile. He noted that the right rear tire was made by U.S. Royal and could have made one of the cast impressions made at the murder scene. Molnar then took paint scrapings from the right rear and left front of the automobile. He was not acting pursuant to a search warrant.

At trial, Molnar testified that the foreign paint scrapings found on the right rear bumper and fender of Paul Radcliffe's 1963 Oldsmobile were beige painted over a grey primer which, in turn, was over a black primer next to metal. The paint samples taken from petitioner's car on October 11, 1967 were also beige painted over a grey primer, over a black primer next to metal. Molnar testified that it was his expert opinion that there was no difference in the color, texture or order of layering of the paint samples taken from the right rear bumper and fender of Radcliffe's automobile and the right rear and left front of petitioner's automobile.

Additional facts relevant to the decision will be set out below with respect to the specific claims for relief.

I, II, III, AND IV

Petitioner's first four claims for relief were not presented to the Fifth District Court of Appeals for Delaware County, Ohio or to the Ohio Supreme Court.

In *Picard v. Connor*, 404 U.S. 270, 275 (1971), the United States Supreme Court held that a federal claim

for relief must be fairly presented to the state courts before it may be considered by a United States District Court in habeas corpus. See, 28 U.S.C. §2254(b), (c). A state prisoner cannot bypass the state courts. But a petitioner need not pursue state court remedies if there is "an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of prisoners." 28 U.S.C. §2254(b).

Petitioner could have presented these claims for relief to the Ohio courts in his direct appeal. At the evidentiary hearing in this Court, Mr. Scott and petitioner testified that petitioner sought to have the issues presented to the Ohio courts but that Mr. Scott, in his professional judgment, decided against raising them.

Fifty per cent of Mr. Scott's practice is in the area of criminal law. He is a respected and competent trial attorney both in the criminal and civil fields. His decision not to raise the issues in the direct appeal represents his best professional judgment which is within the range of reasonably competent judgment constitutionally mandated. *See, McMann v. Richardson,* 397 U.S. 769, 772-773 (1970).

On the other hand, there is no evidence that petitioner decided to voluntarily forego his right to present these claims to the Ohio courts.[1]

The question remains: is there an available Ohio precedure in which petitioner can raise the first four claims for relief alleged herein. Respondent asserts that petitioner has available the remedy of a delayed appeal from the judgment of conviction to the Fifth District Court of

[1] Whether or not he waived his right to present these claims to the Ohio courts is governed by Ohio law. But, assuming these claims for relief raise constitutional questions, petitioner's conduct did not amount to "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). He sought to have the claims presented to the Ohio courts.

Appeals under the provisions of §2953.05, Ohio Revised Code. Alternatively, respondent contends petitioner has available the remedy of a petition to vacate sentence under the provisions of §2953.21, *et seq.*, Ohio Revised Code.

A prisoner is not required to undertake a futile exhaustion of State remedies. *See, e.g., Terry v. Wingo,* 454 F.2d 694 (6th Cir. 1972); *Woodards v. Cardwell,* 430 F.2d 978 (6th Cir. 1970); *cert. denied,* 401 U.S. 911 (1971); *Allen v. Perini,* 424 F.2d 134 (6th Cir. 1970), *cert. denied,* 400 U.S. 906 (1970); *Lucas v. Michigan,* 420 F.2d 259, 261 (6th Cir. 1970); *Duke v. Wingo,* 386 F.2d 304, 306 (6th Cir. 1967), *cert. denied,* 397 U.S. 1013 (1970).

Presenting the claims for relief in a post-conviction petition would be futile. In *State v. Duling,* 21 Ohio St. 2d 13 (1970), the Ohio Supreme Court held that constitutional claims could not be considered in proceedings under §2953.21, *et seq.*, Ohio Revised Code if they have already been *or could have been* fully litigated on direct appeal. The first four claims for relief herein could have been raised on direct appeal, therefore post-conviction relief is unavailable.[8]

The Court now turns to the question of the availability of a delayed appeal. The general rule is that an Ohio prisoner who was convicted after trial is required to raise his claims for relief in a direct or delayed appeal under the provisions of §2953.05, Ohio Revised Code to exhaust his available state court remedies as required by 28 U.S.C. §2254(b), (c). *See, Mackey v. Koloski,* 413 F.2d

[8] In the instant case, petitioner and his counsel knew the issues could have been raised on direct appeal. In *Duling,* the constitutional claim had not yet been recognized by the courts at the time of direct appeal and was consequently unknown to the prisoner and his attorney at the time of appeal. Yet, the Ohio Supreme Court held that the unrecognized constitutional claim "could" have been raised on direct appeal. The prisoner was barred from raising the claim in post-conviction proceedings.

1019 (6th Cir. 1969). Section 2953.05, Ohio Revised Code provides, in relevant part:

> Appeal . . . may be filed as a matter of right within thirty days after judgment and sentence or from an order overruling a motion for a new trial. . . . After the expiration of the thirty day period . . . such appeal may be taken only by leave of the court to which the appeal is taken.

Ohio courts have uniformly held that a defendant must show good cause why he did not file a direct appeal to be granted leave to file a delayed appeal. *State v. McGahan*, 86 Ohio App. 283, 284 (Franklin Cty. Ct. Apps. 1949); *Ex parte Hertz*, 74 Ohio L. Abs. 71 (Franklin Cty. Ct. Apps. 1953). *See, State v. Sims*, 27 Ohio St. 2d 79 (1971); *Toledo v. Reasonover*, 115 Ohio App. 434 (Lucas Cty. Ct. Apps. 1962); *State v. Steele*, 30 Ohio Ops. 2d 41, 42 (Ross Cty. Ct. Apps. 1964).

This Court can find no reported case deciding whether a delayed appeal lies to raise issues which were not raised on direct appeal.

This Court believes that §2953.05, Ohio Revised Code should be construed liberally in favor of granting a remedial process through which constitutional questions may be raised. *See, Case v. Nebraska*, 391 U.S. 336 (1965).

The existing Ohio case law is consistent with this interpretation. Therefore, the Court concludes that if petitioner can show good cause why these issues were not presented on direct appeal, he has available the state court remedy of a delayed appeal. *But cf., Woodards v. Cardwell, supra.*

The Court HOLDS that petitioner has not exhausted his available state court remedies with respect to the first

four claims for relief as required by 28 U.S.C. §2254(b), (c).

V

We reach now the fifth claim for relief. Petitioner contends the warrantless seizure of his 1966 Pontiac, its subsequent search and resultant seizure of paint scrapings and the admission of evidence and testimony relating to analysis of the paint samples was in violation of the Fourth and Fourteenth Amendments.[9]

Respondent argues that the search was justified either on the theory that it was incident to a valid arrest or because the officers had probable cause to believe the car was an instrumentality of a crime. If these arguments fail, respondent alleges that petitioner voluntarily surrendered the keys to the automobile and requested that the officers take the car into custody. Finally, no items were seized from the interior of the car. The exterior of the automobile was in plain view and consequently the paint scrapings were subject to seizure because the officers had probable cause to believe the automobile was used in the commission of a crime.[10]

Petitioner's fifth claim for relief has been raised at every stage of the Ohio proceedings. After the hearing

[9] In addition to taking paint samples, Molnar opened the trunk and observed a Uniroyal tire. He also noted the make of all the tires on the automobile. A photograph was taken of the automobile and introduced into evidence at trial. Petitioner contends the admission of this testimony and evidence also violated the Fourth and Fourteenth Amendments.

[10] Respondent also apparently argues that there was no search and seizure because the only thing seized — paint — was from the exterior of the car. No cases are cited supporting this novel proposition. Admittedly, testimony describing the exterior color of the car would not run afoul the Fourth Amendment if the witness had lawfully been in a position to observe its color. However, the intrusion herein was not limited to an observation of the exterior of the automobile. A search was conducted of the lawers of paint beneath the visible surface of the vehicle.

on the motion to suppress, the Delaware County Common Pleas Court made no detailed findings of fact. The Common Pleas Court made the general finding that "the car was seized, impounded and searched because of the crime for which the defendant was arrested. . . ." Upon consideration of the evidence as a whole the Common Pleas Court concluded:

> It appears to this court that it was reasonable for law enforcement officers to immediately seize a car which their investigation gave them reasonable cause to believe it had been used in the commission of a felony charge. The car was in the possession or constructive possession of the defendant; he had the keys and parking ticket for it. It was on a public parking lot adjacent to the building which public state offices are located and where the defendant had just been arrested.
>
> This is not a case in which a person's home or private structure has been unreasonably invaded. This is not a case in which an individual's person has been unreasonably searched.
>
> In this court's opinion the seizure of this car was incident to a lawful arrest. In this court's opinion subsequent search of this car was a reasonable search of a legally impounded vehicle and was incidental to the crime for which the defendant was arrested.

The Fifth District Court of Appeals for Delaware County on consideration of petitioner's appeal held:

> Defendant-appellant sets forth ten assignments of error. We have carefully examined the record, assignments of error, bill of exceptions, heard the oral arguments of counsel, and find no error prejudicial to the defendant-appellant.

The Ohio Supreme Court found that petitioner's automobile was used as an instrumentality of a crime:

> In the instant case, the investigating authorities had reasonable grounds to believe that the car had been used in the furtherance of the commission of the crime; that because it was used to push the victim's car over the river embankment, it was an instrumentality of the crime. Therefore, two samples were taken from the exterior of the car to compare the paint found on decedent's car.

The Ohio Supreme Court then held:

> that the examination by the police of an automobile which is an instrumentality of a crime, for evidence in connection with the crime in which the automobile was used, is not an unlawful search and seizure even though the examination is conducted at a time and place remote from the time and place of the arrest of the owner and seizure of the automobile.
>
> Since the seized car was an instrumentality used in the crime, the authorities had as much right to examine it as they would to examine a weapon claimed to have been used in the commission of a crime.

Each of the above courts was presented with the argument that petitioner had consented to the search by voluntarily relinquishing the keys to the officers. The consent rationale was not adopted by any Ohio court. However, respondent again asserts that petitioner's "consent" to police officers taking custody of the automobile is a factor which contributes to the lawfulness of the search and seizure of the automobile.

The following general rules govern the determination of whether a defendant has given his consent to a search:

1. The government has the burden of proving consent was given. *Bumpers v. North Carolina*, 391 U.S. 543, 548 (1968); *Rosenthall v. Henderson*, 389

F.2d 514, 515-516 (6th Cir. 1968); *Simmons v. Bomar*, 349 F.2d 365 (6th Cir. 1965); *Kovach v. United States*, 53 F.2d 639 (6th Cir. 1931); *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951); *Watson v. United States*, 249 F.2d 106, 108 (D.C. Cir. 1957); *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962); *United States v. Page*, 302 F.2d 81, 83 (9th Cir. 1962); *State v. McCarthy*, 20 Ohio App. 2d 275, 284-285 (Cuyahoga Cty. Ct. Apps. 1969).

2. The prosecution must demonstrate that the consent is uncontaminated by any duress or coercion, either express or implied. *Simmons v. Bomar, supra*; *Judd v. United States, supra*; *United States v. Page, supra; Watson v. United States, supra.*
3. The consent must be "unequivocal, specific and intelligently given." *Simmons v. Bomar, supra*; *Kovach v. United States, supra*; *Judd v. United States, supra*; *United States v. Page, supra*; *Villano v. United States, supra.*
4. If the defendant was in custody, there must be clear and positive testimony that he voluntarily consented to the search. *Catalanotte v. United States*, 208 F.2d (6th Cir. 1963); *Judd v. United States, supra; United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied* 372 U.S. 906 (1963); *United States v. Page*; *see also, Hubbard v. Tinsley*, 350 F.2d 397, 398 (10th Cir. 1965).
5. Courts indulge every reasonable presumption against the waiver of fundamental constitutional rights. *United States v. Page, supra*; *Weed v. United States*, 340 F.2d 827, 829 (10th Cir. 1965); *see generally, Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).
6. Consent to search is not lightly to be inferred. *Simmons v. Romar, supra*; *Rosenthall v. Hender-*

son, supra; *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965).

7. Whether consent was given is an issue of fact which must be determined by the United States District Court in a habeas corpus action where there is no state court finding of fact which complies with the requirements of 28 U.S.C. §2254(d). *Rosenthall v. Henderson, supra.*

Cases collected in ANNO: VALIDITY OF CONSENT TO SEARCH GIVEN BY ONE IN CUSTODY OF OFFICERS, 9 ALR 3d 858 (1966 and 1971 Supp.) indicate that if a defendant who has been stopped in an automobile either gives the keys to the automobile to officers for the express purpose of facilitating a search of the automobile, *McDonald v. United States*, 307 F.2d 272 (10th Cir. 1962); *Grice v. United States*, 146 F.2d 849 (4th Cir. 1945); *Robinson v. United States*, 325 F.2d 880 (5th Cir. 1964); *United States ex rel Anderson v. Rundle*, 274 F.Supp. 364 (E.D. Pa. 1967), or tells the officers to go ahead and search the automobile because he has nothing to hide, *Hughes v. United States*, 377 F.2d 515 (9th Cir. 1967); *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967); *United States v. Bonano*, 390 F.2d 647 (3d Cir. 1968) the consent to search is valid. But, when police officers announce that they are going to seize the automobile and the defendant then hands over the keys to it, the consent is invalid. *Weed v. United States, supra*; *also see, United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966); *United States v. Barton, supra.*

Viewing the evidence in the light most favorable to the State, petitioner did not clearly and unequivocally consent to the seizure and search of the automobile. The testimony of Deputy Lavery and investigator Mann established, at most, that petitioner consented to their taking

of the car for safekeeping. There is no evidence
titioner consented, expressly or impliedly, to a
of the automobile for purposes of a search. All
vidence demonstrates petitioner desired that the
bile be maintained in a safe condition for the
liate or ultimate) use of his wife and family.[11]
fact, the arresting officers asserted that they were
the automobile on a different ground—that it was
umentality used in the commission of a felony. By
ce, they rejected petitioner's alleged "consent"
it was too limited.

Court further finds the defendant's counsel, Mr.
who is experienced in the practice of criminal law,
rything within his ability to protect petitioner's
Amendment rights.

r the circumstances of this case, the Court
S that petitioner did not consent to the seizure and
uent search of his automobile.

Court now turns to the two main justifications as-
for the warrantless search and seizure of peti-
automobile: (1) it was seized incident to peti-
arrest, and (2) it was seized as an instrumentality
murder in plain view of the officers.

olidge v. New Hampshire, 403 U.S. 443, 454-55
, Mr. Justice Stewart succinctly stated the govern-
nciple of search and seizure:

Searches conducted outside the judicial process,
thout prior approval by judge or magistrate, are
r se unreasonable under the Fourth Amendment—

State implies, but does not support by decisional law, that automobile was in police custody they could do with it what uld. This view was rejected in *Coolidge v. New Hampshire*, 443, 468, 471 (1971). Assuming the automobile was lawfully custody for safekeeping, the State was not justified in taking apings from the vehicle. Such an intrusion is not a normal sary result of impounding a vehicle. *Cf., Harris v. United* 90 U.S. 234, 236 (1968).

subject only to a few specifically established and well-delineated exceptions." [5] The exceptions are "jealously and carefully drawn." [6] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made the course imperative." [7] "[T]he burden is on those seeking the exemption to show the need for it." [8]

Thus, this Court starts with the premise that the warrantless search and seizure herein was unconstitutional, and its fruits inadmissible at trial, unless the State can prove that it fell within one of the well-delineated exceptions to the general rule. Each justification asserted will be discussed in turn.

A. *Search Incident to an Arrest.*

In *Chambers v. Maroney*, 399 U.S. 42, 47 (1970), the Supreme Court recognized that a search cannot be justified as incident to an arrest if it is not contemporaneous in time and place to the arrest. *See also, Preston v. United States*, 376 U.S. 364, 367 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). Nonetheless, if the vehicle is seized at the time of arrest and the circumstances of the arrest would have justified a search of the vehicle incident to the arrest, a search of the vehicle conducted at a later time and place is reasonable under the Fourth Amendment. *Chambers v. Maroney, supra at* 52.

The search of petitioner's automobile was not incident to his arrest because it was conducted at a time and place remote from it. The question remains, could the

[5] *Katz v. United States*, 389 U.S. 347, 357.

[6] *Jones v. United States*, 357 U.S. 493, 499.

[7] *McDonald v. United States*, 335 U.S. 451, 456.

[8] *United States v. Jeffers*, 342 U.S. 48, 51.

See also, *Coolidge v. New Hampshire, supra* 403 U.S. at 481, 484; *United States v. Nelson*, No. 71-1155-56 (6th Cir. April 21, 1972) (citing the language from Justice Stewart's opinion at pp. 454-455 approvingly).

State have seized the car incident to the arrest, thus placing the search within the *Chambers* exception.

The rationale permitting warrantless searches incident to an arrest rests upon the conclusion that one or both of the following factors precluded the police from obtaining a search warrant and made it reasonable for the officers to search the automobile rather than obtain a warrant:

a. The circumstances establishing probable cause for search of the vehicle were unknown to the police prior to the defendant's apprehension.

b. The vehicle is mobile, and if officers delay to obtain a search warrant, one of defendant's confederates will remove the automobile and prevent the police from searching for the object or objects subject to seizure.

Carroll v. United States, 367 U.S. 132 (1925); *Chambers v. Maroney, supra*, 399 U.S. *supra* at 50-51.

Cases involving asserted searches of automobiles incident to an arrest fall into four factual categories:

1. Defendant lawfully arrested inside an automobile and the arresting officers had probable cause to believe that contraband or other evidence of a crime was concealed in the automobile.

   Chambers v. Maroney, supra; *Arwine v. Bannan*, 346 F.2d 458 (6th Cir. 1965); *cert. denied* 382 U.S. 882 (1965); *United States v. Dento*, 382 F.2d 361 (3d Cir. 1967), *cert. denied* 389 U.S. 944, *rehearing denied* 389 U.S. 997 (1967).

2. Defendant lawfully arrested at or near the scene of a crime soon after its commission, and the police had probable cause to believe that contraband or other evidence of a crime was concealed in the automobile which was parked at or near the scene of the crime. Other known accomplices are still at large.

United States v. Mazzochi, 424 F.2d 49 (2d Cir. 1970); *Moodyes v. United States*, 400 F.2d 360 (8th Cir. 1968), *cert. denied* 397 U.S. 998 (1970); *Cf. United States v. Roth*, 430 F.2d 1137 (2d Cir. 1970), *cert. denied* 400 U.S. 1021 (1970); *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert. denied* 386 U.S. 964 (1967).

3. Defendant arrested lawfully some time after the commission of the offense (usually a day or more) and at a place removed from the vehicle searched. Police had probable cause to believe that contraband or other evidence was concealed in the automobile.

   United States v. Marti, 421 F.2d 1263 (2d Cir. 1970); *Staples v. United States*, 320 F.2d 817 (5th Cir. 1963); *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960); *Williams v. United States*, 323 F.2d 90 (10th Cir. 1963), *cert. denied*, 376 U.S. 906 (1964); *Derby v. Cupp*, 302 F.Supp. 686 (D. Ore. 1969); *United States v. Barton*, 282 F.Supp. 785 (D. Mass. 1967); *Conti v. Morgenthau*, 232 F.Supp. 1004 (S.D. N.Y. 1964); *Lucas v. Mayo*, 222 F.Supp. 513 (S.D. Tex. 1964); *Commonwealth v. Togo*, 248 N.E. 2d 285 (Mass. S. Ct. 1969). *But see, Drummond v. United States*, 350 F.2d 983 (8th Cir. 1965), *cert. denied* 384 U.S. 944 (1966); *McCoy v. Cupp*, 298 F.Supp. 329 (D. Ore. 1969); *United States v. Francolino*, 367 F.2d 1013 (2d Cir. 1966), *cert. denied* 386 U.S. 960 (1967); *Browning v. United States*, 366 F.2d 420 (9th Cir. 1966).

4. Defendant arrested without probable cause and his automobile searched.

   Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

Searches made in the first two categories have been held to be reasonable under the Fourth Amendment. Cases falling within the fourth category are clearly unconstitutional because the searches were made without probable cause. Searches in the third category have generally been held invalid.

The United States Supreme Court recently considered a factual pattern falling within the third category in *Coolidge v. New Hampshire*, 403 U.S. 443 (1970). The facts in *Coolidge* are substantially identical to those in the instant case. Coolidge was the prime suspect in a murder investigation. Police talked with him on several occasions. Eventually, they obtained an arrest warrant for Coolidge and a search warrant for his automobile. The warrants were invalid, but the officers did have probable cause to arrest Coolidge without a warrant. Coolidge was arrested in his home pursuant to an invalid warrant and his automobile, which was parked outside his home in the driveway, was seized under the invalid warrant. The Supreme Court held that under its decisions prior to *Chimel v. California*, 395 U.S. 752 (1969), which substantially restricted the scope of searches incident to an arrest, the seizure of the car the night of Coolidge's arrest and its search several days later was not incident to an arrest.

Assuming that the arrest herein was lawful,[12] the search of petitioner's car was not incident to the arrest

[12] The affidavit in support of the arrest warrant merely recited the statutory elements of first degree murder. It contained *no facts* from which a magistrate could conclude that there was probable cause to believe petitioner had committed the crime. The affidavit was insufficient to support the issuance of the warrant. *Whiteley v. Warden*, 401 U.S. 560 (1971); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Rugendorf v. United States*, 376 U.S. 528 (1964); *Jones v. United States*, 362 U.S. 257 (1960); *Giordenello v. United States*, 357 U.S. 480 (1958).

But the facts known to the arresting officer, see pp. 6-7, *supra*, were sufficient to establish probable cause for the arrest.

within the exception created by *Chambers*. The automobile was not in petitioner's immediate possession or control at the time of the arrest. *Cf. United States v. Rabinowitz*, 339 U.S. 56 (1950).

Neither of the two reasons advanced to justify searches incident to an arrest were existent. See pp. 22-23, *supra*. The first condition was not met because the reasons establishing probable cause to search the automobile were known to officers days, if not weeks, prior to its seizure and subsequent search. The second condition was not met because the officers knew the whereabouts of the car prior to its search and seizure. They could have obtained a warrant at any time, including the morning of October 10, 1967 or any time following petitioner's arrest. There was no danger a confederate would remove the vehicle and destroy evidence. The murder occurred July 19, 1967. Petitioner was first interviewed July 24, 1967. He was again interviewed on September 28, 1967. He knew that he was a prime suspect when he was requested to meet with investigators on October 10, 1967. Petitioner had already been afforded ample opportunity to destroy evidence. If there were any further danger that a confederate would destroy evidence following petitioner's arrest, the State had ample opportunity to obtain a search warrant and eliminate the risk.

The Court HOLDS that the search of petitioner's automobile was not incident to his arrest and did not fall within the *Chambers* exception to the prohibition against unwarranted searches. *See, Coolidge v. New Hampshire*, 403 U.S. *supra*, at 455-457, 473-484; *Cook v. Johnson*, No. 71-1997 (6th Cir. April 18, 1972).

B. *Instrumentality.*

The Ohio Supreme Court held that the automobile was subject to seizure as an instrumentality of the mur-

der which was in plain view. See p. 17, *supra*. This theory was also rejected by the United States Supreme Court in *Coolidge*.

The instrumentality theory assumes that any object used in the commission of a crime may be seized *at any time* without a warrant as long as the officers have probable cause to believe that the object was used in the commission of a crime and the officers are lawfully in a position to view the object.[13] See, *State v. Lewis*, 22 Ohio St. *supra* at 128-130 and the cases cited therein.

In rejecting this theory, the United States Supreme Court held that all warrantless searches are *per se* unreasonable absent "exigent circumstances" and that when police plan to seize an automobile prior to the time of arrest but fail to obtain a valid warrant, the search violates the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. *supra* at 478, 481. The police cannot seize an automobile on the theory that it is an instrumentality of a crime which is in plain view in calculated disregard for the Fourth Amendment requirement that application be made to a judicial officer for a search warrant absent exigent circumstances.[14]

The Court HOLDS that the seizure and subsequent search of petitioner's automobile cannot be justified on

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[13] In *Coolidge*, the Supreme Court recognized that such a seizure would be justified if the object came into view inadvertently while officers were in hot pursuit of a suspect, *Warden v. Hayden*, 387 U.S. 294 (1967), incident to a lawful arrest, *Chimel v. California*, 395 U.S. 752, 762-763 (1969), or on an occasion unconnected with an arrest or search when an officer inadvertently observes an incriminating object, *Harris v. United States*, 390 U.S. 234 (1968). *Coolidge v. United States*, 403 U.S. *supra* at 465-466.

[14] Respondent's contention that officers were lawfully in the presence of the automobile to view its exterior because petitioner "consented" to their taking custody of it is irrelevant to a determination of this issue. Assuming officers were legally in position to view the automobile, they could not claim "exigent circumstances" when they had intended to search the automobile for some time prior to the arrest, yet failed to obtain, or even attempt to obtain, a search warrant.

the grounds that it was seized in plain view as an instrumentality of the murder. *Coolidge v. New Hampshire*, 403 U.S. *supra*, at 464-473, 478, 481, 484; *Cook v. Johnson*, *supra*.

There were no exigent circumstances permitting the warrantless search of petitioner's automobile. Therefore, the Court HOLDS that the fruits of the search should have been excluded from evidence at trial and were erroneously admitted into evidence in violation of the Fourth and Fourteenth Amendments.

The error requires the issuance of the writ of habeas corpus, because the Court cannot declare that the admission into evidence of the paint scrapings was harmless beyond a reasonable doubt.[15] *Chapman v. California*, 386 U.S. 18, 21-24 (1967).

Petitioner's conviction rested entirely upon circumstantial evidence. The laboratory analysis of the paint scrapings taken from petitioner's car and the expert's opinion that there was no difference in color, texture or order of layering of the paint from petitioner's automobile and the foreign paint found on the victim's automobile was an important link in the prosecution's case. The evidence was offered to prove that petitioner was at the murder scene and had used his automobile to push the victim's automobile over the embankment.

Under these circumstances, the Court cannot say that the evidence did not contribute to petitioner's conviction.

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[15] The only evidence seized was the paint scrapings from the right rear and left front of the automobile. Steve Molnar, Jr., the BCI lab technician who seized the paint from the automobile also opened the trunk. At trial he testified that he observed a new Uniroyal tire. It was not seized. This testimony was not critical to the State's case. It was merely cumulative. The clerk who sold the two Hercules Safety Cream 855.14 tires found on the front of petitioner's 1966 Pontiac and the mechanic who put them on and took off two almost new Uniroyal tires and placed them in the trunk both testified at trial.

Chapman v. California, supra; *Rosenthall v. Henderson*, 389 F.2d *supra* at 516.

Therefore, the Court HOLDS that petitioner's fifth claim for relief is MERITORIOUS.

VI

Petitioner alleges that the State denied him his right to a fair trial when the prosecutor issued a news release announcing that the prosecution had subpoenaed Mrs. Betty Cummins Lewis, petitioner's "other wife," as a witness, but subsequently did not call her as a witness.

The evidence at the evidentiary hearing was that newspaper articles did appear the week before the trial stating that the State's first subpoena was issued for Mrs. Betty Cummins Lewis. Later, the issuance of other subpoenas were not announced individually.

The State intended to call Betty Cummins Lewis to prove petitioner's indebtedness. During the trial, the trial court admonished the prosecutor to avoid getting into the alleged relationship between Mrs. Betty Cummins Lewis and petitioner if she was called to the stand. The State announced to the court its intention to call her, but after a recess decided that it had already presented sufficient evidence of petitioner's indebtedness and did not, in fact, call her as a witness.

The Court has carefully reviewed the evidence offered by petitioner to prove this allegation and concludes that there was not such a probability of prejudice from the pretrial publicity as to prevent a fair and impartial trial by jury. *See, Estes v. Texas*, 381 U.S. 532, 542-543 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Further, there is no evidence that the State knowingly engaged in tactics calculated to deprive the petitioner of his right to a fair trial. *See, Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Chambers v. Florida*,

309 U.S. 227 (1940); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, —— U.S. —— (1972).

Therefore, the Court HOLDS that the sixth claim for relief is without merit, and therefore it is DENIED.

VII

Petitioner objects to the admission into evidence of the hearsay testimony of Mrs. Jack Smith that she received a call from a person who identified himself as "Radcliffe."[16] In *State v. Lewis*, 22 Ohio St. 2d 125, 131-134 (1970), the Ohio Supreme Court held that the testimony was admissible under Ohio law to establish the fact that the phone call was made but not to establish the truth of the caller's statements. The testimony was admitted at trial for that permissible purpose.

The Confrontation Clause does not constitutionalize the rules governing the admission of hearsay evidence. Each State may establish its own rules of evidence. The Confrontation Clause is not a mechanism by which federal courts propound state court rules of evidence. *Dutton v. Evans*, 400 U.S. 74, 80, 86 (1970), *Cf. Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). A United States District Court does not sit as a court of appeals to review allegations of state trial court error. *See, Reese v. Cardwell*, 410 F.2d 1125 (6th Cir. 1969).

There was no violation of the Confrontation Clause. Mrs. Smith testified under oath and was available for cross-examination. The jury had an opportunity to view

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[16] At trial, Mrs. Smith testified that she had received a telephone call between 9:00 a.m. and 9:30 a.m. on July 19, 1967 from a person who identified himself as "Radcliffe" or "Mr. Radcliffe." She testified, over objection, that the caller said: "I went over the books last night and this morning. Everything is in A-1 shape [or condition]. I am going out of town, and I won't be back until Tuesday." Mrs. Smith testified that the caller was not Paul Radcliffe.

her demeanor and judge her credibility. This is all the confrontation clause requires under the circumstances. *California v. Green*, 399 U.S. 149, 158-159 (1970). The truth or falsity of the extra judicial declarant's statement that he had examined the books, found them in A-1 condition, and was going out of town was not at issue. Therefore, petitioner was not deprived of his right to cross-examine the caller.

The Court HOLDS that petitioner's seventh claim for relief is without merit.

VIII. IX

Petitioner's eighth claim for relief is an allegation that the trial court erroneously admitted incompetent and irrelevant testimony into evidence. His ninth claim for relief is that the trial court erred in arbitrarily limiting defense counsel in the scope of his direct examination of a defense witness. Both of these claims for relief are allegations of State trial court error.

Errors in the admission of evidence committed by a state trial court, which do not violate any specific constitutional guarantee, are not cognizable in habeas corpus. *See, Reese v. Cardwell, supra*; *Schalf v. Bennet*, 408 F.2d 325 (8th Cir. 1969), *cert. denied*, 396 U.S. 887 (1969); *Crisafi v. Oliver*, 396 F.2d 293 (1968), *cert. denied*, 393 U.S. 889 (1968); *Durham v. Haynes*, 368 F.2d 989 (8th Cir. 1968); *Trujillou v. Tinsley*, 333 F.2d 185 (10th Cir. 1964), *see also, Ballard v. Howard*, 403 F.2d 653 (6th Cir. 1968); *Fernandez v. Klinger*, 346 F.2d 210 (9th Cir. 1965), *cert. denied*, 382 U.S. 895 (1965); *Edmondson v. Warden*, 355 F.2d 608 (4th Cir. 1964).

The errors alleged in the eighth and ninth claims for relief are of State law and they do not amount to a deprivation of a specific constitutional right.

Therefore, the Court HOLDS that the claims for relief numbered eight and nine are without merit, and therefore they are DENIED.

X

Petitioner's final claim for relief is that newly discovered evidence entitled him to a new trial.

This claim is a matter of State law and was fully and fairly considered by the Ohio Supreme Court.

There is a suggestion in petitioner's brief that law enforcement officers or the prosecution may have suppressed the potentially exculpatory evidence. *See, Brady v. Maryland, supra*; *Giglio v. United States, supra.*

The evidence adduced at the evidentiary hearing is as follows. In May, 1967, Paul Radcliffe told Harrison S. Berlin, a client, that he had been threatened by a man with a shotgun. Mr. Radcliffe gave no details of the threat. He did not say where or when the threat occurred. Shortly after the murder, Mr. Berlin called the Franklin County Sheriff's Office and reported his earlier conversation with Mr. Radcliffe. Det. Samuel Powers of the Franklin County Sheriff's Office received the report of the threat. He did not consider it important because neither the time nor place of the incident was known. He did tell Deputy Lavery about the report, although he could not recall whether he ever knew Mr. Berlin's first name.

On July 25, 1967, an article appeared in the Columbus *Dispatch* reporting the May threat incident in detail. Jay Gibian, the newsman who wrote the article, testified at the evidentiary hearing that he had been told of the threat by Deputy Lavery and Det. Powers. Mr. Gibian never knew the name of the person who made the report of the threat to the Franklin County Sheriff's Office.

Before trial, Paul Scott talked with Deputy Lavery about the reported May threat on Radcliffe's life. Deputy Lavery told Mr. Scott that the report of the threat was made by a person named Berlin. Lavery may have said "Roger Berlin." Mr. Scott testified that he didn't believe Deputy Lavery had attempted to mislead him.

The defense subpoenaed Roger Berlin at trial because he would not talk to Mr. Scott prior to trial. Roger Berlin was called as a witness but gave no testimony relevant to the case. Mr. Scott then learned that Roger Berlin had a brother, Harrison. The defense did not subpoena Harrison Berlin.

The Court finds that there was no deliberate misrepresentation regarding the identity of Harrison Berlin as the person who reported a May, 1967 threat on Paul Radcliffe's life to the Franklin County Sheriff's Office. Therefore, the Court concludes that petitioner was not deprived of any right under the Constitution of the United States.

The Court HOLDS that petitioner's tenth claim for relief is without merit.

WHEREUPON, the Court HOLDS that the petition is without merit with respect to the claims for relief numbered 1-4, 6-10, and therefore it is DENIED with respect to these claims. The Court FURTHER HOLDS that the petition is meritorius with respect to the fifth claim for relief, and therefore it is GRANTED with respect to that claim.

Accordingly, it is ORDERED that the writ of habeas corpus issue ninety days after the filing of this Opinion and Order, and that petitioner be released from custody, unless within such ninety day period State officials initiate action for a new trial of petitioner. If State officials

initiate action for a new trial, it is ORDERED that no writ of habeas corpus shall issue.

/s/ JOSEPH P. KINNEARY
United States District Judge